

## **Environmental Information Regulations 2004 (EIR) Decision Notice**

**Date:** 30 August 2019

**Public Authority:** London Borough of Croydon  
**Address:** Bernard Weatherill House  
8 Mint Walk  
Croydon  
CR0 1EA

### **Decision (including any steps ordered)**

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1. The complainant requested information relating to pre-application advice regarding a specified property. The London Borough of Croydon refused the request in reliance on regulation 12(4)(b) on the basis that the request was manifestly unreasonable.
2. The Commissioner's decision is that the Council was not entitled to rely on regulation 12(4)(b) to refuse the request. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the request that does not cite the exception at regulation 12(4)(b) of the EIR.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Request and response**

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4. The complainant requested the following information, relating to a specified planning application, from the Council on 13 June 2018:

*Please provide any information relating to the developer's submission(s) and [Name of Council employee]'s advice, including but not restricted to copies of the following:*

- *the completed Request for Pre-Application Advice form,*
  - *evidence of fee payment,*
  - *the Applicant's cover letter,*
  - *letters/emails of consultation WITH internal/external consultees,*
  - *comments/observations BY internal/external consultees,*
  - *details of any meeting arrangements,*
  - *notes of any pre-application meeting[s], and*
  - *the case officer's advice letter[s] or email[s].*
5. The Council acknowledged receipt but did not issue a substantive response, despite several chasers from the complainant, until 3 September 2018.
  6. The Council's response of 3 September 2018 stated that the request was being refused in reliance on the exception at regulation 12(4)(b) of the EIR. The Council stated that it had assessed the request as manifestly unreasonable.
  7. In its refusal notice the Council also advised that it would no longer respond to requests for information or requests for internal reviews relating to pre-planning and planning applications. The Council cited regulation 12(4)(b) of the EIR and section 17(6) of the FOIA.
  8. The complainant requested an internal review on 11 September 2018, and the Council responded to him on 1 October 2018. The Council advised that, as set out in its letter of 3 September 2018, it was unwilling to conduct an internal review and referred the complainant to the Commissioner.

### **Scope of the case**

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9. The complainant confirmed to the Commissioner on 11 October 2018 that he wished the Commissioner to investigate the way his request for information had been handled.
10. The Commissioner notes that the Council refused to conduct an internal review. The Commissioner would not normally accept a complaint without an internal review having been conducted. She is also mindful that the EIR explicitly requires that a public authority consider representations from the applicant. However in this case the Commissioner has decided to use her discretion to accept the complaint as valid without an internal review. The Commissioner sought to explore whether informal resolution might be possible but the Council confirmed that it wished to maintain its reliance on regulation 12(4)(b).

11. The Commissioner also notes that the complainant in this case has asked her to investigate a number of requests he made to the Council. This decision notice relates only to the request made on 13 June 2018. Although some of the analysis will be the same as that set out in other decision notices, the Commissioner has carefully considered the correspondence and chronology of this case.

## Reasons for decision

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### Regulation 12(4)(b): manifestly unreasonable request

12. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable.
13. The term "manifestly unreasonable" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC*.<sup>1</sup> In this case the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, – save that the public authority must also consider the balance of public interest when refusing a request under the EIR.
14. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

### The Council's position

15. The Commissioner invited the Council to explain why it considered the complainant's request of 13 June 2018 to be manifestly unreasonable. The Council referred the Commissioner to the explanation provided in its refusal notice dated 3 September 2018. The Council stated in this correspondence that the complainant had submitted 19 requests for information between October 2017 and August 2018. Most of them related to pre-planning and planning applications submitted by a

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<sup>1</sup> *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC)

particular developer, although the Council said that the complainant had made several requests about another developer. The complainant had also requested "over 12 internal reviews" and the Council said it had exchanged correspondence with the Commissioner's case officers regarding some of these requests.

16. The refusal notice also contained extensive extracts from the Commissioner's published guidance regarding regulation 12(4)(b). The Council considered that the following indicators, as outlined in the guidance, were met:
  - Burden on the authority
  - Unfounded accusations
  - Frequent or overlapping requests
  - Unreasonable persistence
  - Disproportionate effort
  - Futile requests and frivolous requests
17. The Council provided the Commissioner with a further submission in support of its position. In respect of burden the Council said that the number of requests submitted by the complainant took up substantial financial and staff resources. The Council had advised the complainant that each request he submitted took six hours to process. The Council explained to the Commissioner that the head of planning signed off all EIR requests in order "to ensure accurate, relevant and necessary information is provided", which took approximately one hour. It also set out that the legal team took six to eight hours to conduct internal reviews since they required research including reading ICO and Tribunal decisions. The Council further estimated that it spent six to seven hours dealing with the Commissioner's enquiries each time the complainant submitted a complaint about the handling of the request.
18. In respect of unfounded accusations, the Council said that the complainant had continually made accusations of impropriety, alleging that Council officers had not carried out their responsibilities correctly. The Council said that the complainant ought to have brought these concerns to its Planning Committee but he had not done so.
19. In respect of frequent or overlapping requests, the Council said that the complainant had demonstrated a pattern of submitting numerous follow up enquiries regardless of the information provided to him. In one case he had requested an internal review of a response, and had in the same correspondence commented on separate planning applications. The Council was of the view that this caused confusion and additional work for its staff.

20. In respect of unreasonable persistence and disproportionate effort the Council said that the complainant made excessive demands on staff time and resources, sending lengthy responses to Council correspondence. The Council also indicated that he also expected immediate responses to his requests and requests for internal review. The Council set out that the complainant refused to accept decisions, repeatedly arguing points with no new evidence, and raising detailed but unimportant questions.
21. In respect of futile requests and frivolous requests, the Council said that the EIR was not the correct mechanism to challenge alleged non-compliance with proper processes. The Council suggested that the complainant was seeking to use his information access rights in a manner that was "inconsistent with the purpose of the legislation". It was not aware of any value the requests provided to the complainant, and was of the view that the requests were of no value to the public.

### **The complainant's position**

22. The complainant disputed the Council's assessment that his request was manifestly unreasonable. He set out that he was concerned about so-called "windfall" development sites (where large, single-dwelling buildings are converted into multiple flats). He wanted to ensure that the process for considering such applications was being carried out properly, that the proper advice was being sought and provided by planning officers and that relevant material objections were being properly considered when applications were approved.
23. The complainant pointed to local concern about "overdevelopment" in the area and argued that it was imperative that such developments be subject to scrutiny. He also stated that a considerable amount of the information was not in the public domain (which he believed it should be) and therefore the EIR was his only tool for accessing it.
24. Specifically the complainant challenged the Council's assertion that his request was of no value to the public. He provided the Commissioner with information relating to a petition, signed by local residents, regarding their interest in his request and asking the Council to disclose the requested information in advance of consideration of the planning application by the Council's Planning Committee in September 2018. The complainant advised the Commissioner that the Council had subsequently approved the application. He also advised that the Council had failed to publish the petition even though its Constitution set out that the wording of petitions would be published.
25. Finally, the complainant disputed the burden that his requests were imposing upon the Council and argued that some of the burden had been created as a result of its failings to handle his requests adequately.

## **The Commissioner's findings**

26. The Commissioner acknowledges that the complainant has concerns about the way the Council's planning processes, in particular pre-application meetings with developers. The Commissioner attaches some weight to the petition produced by the complainant, although she is mindful that a request is not automatically of value on the basis of the number of people who claim to be interested in the requested information. The number of signatories to the petition does support the complainant's argument that local residents share at least some of his concerns about the Council's handling of planning matters.
27. The Commissioner would stress that she cannot comment on the complainant's concerns insofar as they extend beyond the Council's handling of information requests. She acknowledges the importance of the public being able to scrutinise the Council's decision making, but is equally mindful that there are more focused channels of complaint available to the public, such as the Local Government Ombudsman.
28. Having examined the correspondence the Commissioner accepts that the Council did receive a number of information requests from the complainant within a relatively short period of time. She considers that the number and frequency of the complainant's requests would be likely to increase the burden on a relatively small number of staff. This is particularly the case in the context of increasing demands on limited resources, which is apparent across the public sector.
29. However, the Council appears to have adopted a time-consuming approach to dealing with what appear to be relatively straightforward requests. The Council's explanation as set out at paragraph 16 above appears to attribute considerable time to activities that are not necessary in every case, such as the head of planning signing off every response, and the legal team reading ICO and Tribunal decisions each time an internal review is requested.
30. The Commissioner observes that the complainant's requests are for similar information relating to various pre-application and planning applications. The Commissioner would expect the Council to have built up some experience in dealing with requests for this type of information, since planning is one of its core functions and EIR access rights came into force in 2005. Therefore she is surprised that the Council does not have a more efficient and streamlined way of handling what could be seen as fairly routine requests. Accordingly, the Commissioner accepts the principle that the volume and frequency of requests contributes to burden, but given the Council's lack of efficiency in handling these requests she cannot attach substantial weight to these arguments.

31. In conclusion, the Commissioner considers this to be a finely balanced case. She questions the reasonableness of the number and frequency of the requests, but is of the opinion that the Council ought to be better able to deal with requests for routine information. The Commissioner is also of the view that the complainant should be more mindful of the pressures on the Council's resources, but on balance she is not satisfied that the Council has demonstrated that the requests are manifestly unreasonable. Therefore the Commissioner finds that the exception at regulation 12(4)(b) is not engaged and she is not required to consider the public interest.

## **Procedural requirements**

### **Regulation 14 – refusal notice**

32. Regulation 14 of the EIR states that, if a public authority wishes to refuse to disclose environmental information, it must issue a refusal notice. Regulation 14(2) states that the notice must be issued no later than 20 working days after the date of receipt.
33. Given that the Council's response took nearly three months to respond, the Commissioner finds that the Council failed to comply with regulation 14(2).

## Right of appeal

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34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: now [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**